IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALBERT LEON MARISCAL,
Appellant.

No. 2 CA-CR 2012-0478
Filed April 18, 2014

Appeal from the Superior Court in Pima County
No. CR20114254001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Katherine A. Estavillo, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Judge Brammer and Judge Johnson concurred. [1]

M I L L E R, Judge:

¶1 Alberto Mariscal was convicted after a jury trial of unlawful flight from a pursuing law enforcement vehicle. On appeal, he argues the trial court erred when it denied his motion for judgment of acquittal, instructed the jury on unlawful flight, and denied his motion for mistrial. For the following reasons, we vacate the criminal restitution order but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustain the jury's verdicts and to resolve all inferences against Mariscal. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). In November 2011, a police officer in a marked vehicle conducted a records check on a sedan and discovered it was uninsured. The officer turned on his flashing lights and pulled the sedan over in a parking lot. The driver, Mariscal, handed the officer his driver's license. When the officer went back to his car to run a records check on the license, Mariscal sped out of the parking lot, eventually reaching speeds the police officer estimated at seventy to ninety miles per hour in a thirty-five mile-per-hour zone. The officer and another officer who had started to assist followed Mariscal out of the parking lot, but turned off their flashing lights after observing him

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, and The Hon. Boyd T. Johnson, a retired judge of the Superior Court in Pinal County, are called back to active duty and are assigned to serve on this case pursuant to orders of this court and the supreme court.

run two red lights. Officers later arrested Mariscal at a residence identified from the facts of the traffic stop. He was charged with unlawful flight, convicted, and sentenced to a presumptive prison term of five years.

Unlawful Flight

Rule 20 Motion

¶3 Mariscal contends the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., because the state did not prove the officers had activated their lights and sirens, or that Mariscal willfully fled. Mariscal argues that activation of lights and sirens is an essential element of the crime of unlawful flight. Alternatively, he contends that even if emergency signal activation is not an element, there was insufficient evidence presented that Mariscal willfully fled a pursuing officer.

¶4 We review de novo a trial court's denial of a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). A Rule 20 motion should be granted if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is that which "'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990).

¶5 Mariscal argues A.R.S. §§ 28-622.01[2] and 28-624(C)[3] required the state to prove the officer used his lights and sirens to

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[2]Section 28-622.01 states:

> A driver of a motor vehicle who willfully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated in the manner described in § 28-624, subsection C is guilty of a class 5 felony. The law enforcement vehicle shall be appropriately marked to show that it is an official law enforcement vehicle.

chase Mariscal after he left the traffic stop without permission. He acknowledges this court rejected a similar argument in *State v. Martinez*, 230 Ariz. 382, 284 P.3d 893 (App. 2012). In *Martinez*, an officer made a traffic stop in his marked patrol car, using his overhead lights to signal the driver to pull over. *Id.* ¶ 2. The driver sped away before the investigation could be completed. *Id.* The officer pursued the truck "for a few moments," but stopped because the driver drove erratically and the officer had sufficient identifying information to effect an arrest at a later time without engaging in a dangerous pursuit. *Id.* Martinez argued there was insufficient evidence of the pursuit because there was no specific testimony the officer had activated his overhead lights after the driver sped away. *Id.* ¶ 5.

¶6 This court held that, on its face, § 28-624(C) did not require the activation of emergency lights to prove the crime of unlawful flight because police vehicles are not required to display their emergency lights under the subsection. *Id.* ¶ 6. This court concluded that, although use of emergency lights "may provide circumstantial evidence that a defendant was 'willfully' fleeing from a law enforcement vehicle, activation of emergency lights is not an essential element of the crime of unlawful flight." *Id.* ¶ 7. Equally

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[3] Section 28-624 allows authorized emergency vehicles to disregard certain traffic laws. Subsection C of § 28-624 further states:

> The exemptions authorized by this section for an authorized emergency vehicle apply only if the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as reasonably necessary and if the vehicle is equipped with at least one lighted lamp displaying a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red or red and blue light or lens visible from in front of the vehicle.

important, *Martinez* held the essential elements of unlawful flight are: "(1) the defendant, who was driving a motor vehicle, willfully fled or attempted to elude a pursuing official law enforcement vehicle, and (2) the law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle." *Id.* ¶ 8.

¶7 Mariscal contends *Martinez* was wrongly decided because it rendered the unlawful flight statute's reference to § 28-624(C) meaningless. He argues the statutes are clear on their face, requiring visible lights and an audible signal as reasonably necessary.[4]

¶8 With respect to the lighting requirement, Mariscal does not explain why a plain reading of § 28-624(C) would disregard the stated exception to that requirement for police vehicles. Rather, he contends the exception "is inapplicable to the essential elements of unlawful flight because common sense mandates that a driver of a motor vehicle must be on notice that a law enforcement vehicle is pursuing him or her, rather than simply following behind in traffic." The plain language of § 28-624(C) and § 28-622.01 does not make this distinction. Rather, Mariscal's concern about notice is addressed in the first element of § 28-622.01, which requires that the defendant must willfully flee.

[4] At oral argument, Mariscal's counsel contended *Martinez* rendered § 28-622.01 unconstitutionally vague because it fails to give notice of unlawful conduct and could encourage arbitrary enforcement. Counsel conceded, however, this facially intriguing specific argument was not made below or in the briefs on appeal. Issues raised for the first time at oral argument are waived absent fundamental error. *State v. Murdaugh*, 209 Ariz. 19, ¶ 29, 97 P.3d 844, 851 (2004). Fundamental error requires a defendant to prove the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607-08 (2005). Mariscal alleged no prejudice relating specifically to this issue; further, for the reasons described *infra* at ¶¶ 11-12, we conclude Mariscal does not meet his burden of proof.

¶9 Mariscal also argues use of a siren "as reasonably necessary" is an essential element of unlawful flight. Despite its holding there were only two essential elements of unlawful flight, the *Martinez* court noted in a footnote that it did not "reach the issue of whether unlawful flight requires proof that an officer used sirens 'as reasonably necessary.'" *Martinez*, 230 Ariz. 382, n.3, 284 P.3d at 384 n.3, *quoting* A.R.S. § 28-622.01. This is a difference without a distinction because we previously held use of a siren is not an essential element of unlawful flight. *See In re Joel R.*, 200 Ariz. 512, ¶¶ 5-8, 29 P.3d 287, 288-89 (App. 2001) (finding use of siren only required when reasonably necessary and concluding record, including deputy's unchallenged testimony sirens unnecessary, supported juvenile court's implicit finding siren not reasonably necessary); *see also State v. Fiihr*, 221 Ariz. 135, ¶ 11, 211 P.3d 13, 16 (App. 2008) (noting use of siren may not be necessary depending on circumstances).

¶10 We have not considered, however, whether the state bears the burden of proving use of a siren was not "reasonably necessary." A.R.S. § 28-624(C). Mariscal contends the use of lights and sirens is "[t]he most obvious way for an officer to alert a motorist to pull over," although he concedes in his reply brief that a police officer owes a duty to use his sirens not to the fleeing driver, but to other drivers on the roadway. *See Herderick v. State*, 23 Ariz. App. 111, 114-15, 530 P.2d 1144, 1146-48 (1975).

¶11 Mariscal's no-siren argument also overlooks undisputed facts found by the jury: he already had acceded to a lawful stop of his vehicle by a uniformed officer using over-head, flashing lights to permit an on-going law enforcement investigation. To the extent Mariscal implicitly contends his decision to speed away from the scene before the officer released him somehow re-set the clock to a time before he was pulled over, he provides no authority for that argument. The argument also ignores the fundamental purpose of the unlawful flight statute, which is to ensure "that motorists stop on command so that, for example, the police can issue a citation, issue directions, or conduct an investigation." *State v. Fogarty*, 178 Ariz. 170, 172, 871 P.2d 717, 719 (App. 1993) (affirming unlawful flight conviction of motorist who

drove lawfully but nonetheless refused to stop his vehicle). A driver who speeds away during the middle of the traffic stop has no better defense than a person who refuses to stop in the first instance. We conclude the specific elements of the offense identified in *Martinez*, coupled with the undisputed facts about the stop and on-going investigation, made it unnecessary for the state to prove a siren was not reasonably necessary.

¶12 Mariscal also argues that even if *Martinez* was decided correctly, there was insufficient evidence that he willfully fled. He contends *Martinez* is distinguishable because the officer there never possessed the driver's license and pursued the vehicle. Mariscal argues he reasonably could have inferred there would be no pursuit and, indeed, one officer admitted he did not need to pursue Mariscal because he held his license. Mariscal's mens rea argument also fails because of the initial stop and the on-going investigation. He points to no evidence he had been released or otherwise was permitted to leave after he had been stopped. To the contrary, the evidence that he sped away and ran two red lights permitted the inference his flight was willful. Based on the record before us, there was substantial evidence Mariscal willfully fled from a law enforcement vehicle. *See In re Joel R.*, 200 Ariz. 512, ¶¶ 3, 8, 29 P.3d at 288-89 (sufficient evidence of unlawful flight where driver sped through neighborhood after officer flashed lights but no siren).

Jury Instruction

¶13 Mariscal contends the trial court erred when it instructed the jury on unlawful flight using the elements of the offense as set forth in *Martinez*. We review de novo whether jury instructions properly state the law. *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Here, the court instructed the jury:

> The crime of fleeing from a pursuing law enforcement vehicle requires proof of the following:
>
> 1. The defendant willfully fled from or willfully attempted to elude a pursuing official law enforcement vehicle; and

> 2. The law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle.

The court also instructed on the definition of "willfully." The instruction is nearly identical to the essential elements of the crime as detailed in *Martinez*, 230 Ariz. 382, ¶ 8, 284 P.3d at 895. Because we decline Mariscal's request that we reject *Martinez*, we conclude the jury instruction properly stated the law.

Motion for Mistrial

¶14 Mariscal argues the trial court erred in denying his motion for mistrial when Officer G. testified there were "other offenses" on Mariscal's record. He contends the testimony was inadmissible evidence of "other acts" under Rule 404(b), Ariz. R. Evid.

¶15 We review the trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). "This deferential standard of review applies because the trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983).

¶16 Evidence of other crimes "is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). We will not reverse a conviction based on the erroneous admission of such evidence "unless there is a 'reasonable probability that the verdict would have been different had the evidence not been admitted.'" *State v. Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d 231, 244 (2003), *quoting State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1013 (2000).

¶17 Before trial, Mariscal filed a motion in limine seeking to preclude the state from introducing evidence he was on parole or there were outstanding warrants for his arrest at the time of the

offense. The trial court granted the motion on the first day of trial, finding the danger of unfair prejudice outweighed the probative value of such evidence. During Officer G.'s testimony, he was handed a copy of Mariscal's record from the Motor Vehicle Division of the Arizona Department of Transportation. When he was asked if the record had "any additional information" compared to another exhibit, Officer G. answered, "[t]here's some offenses on it." Mariscal requested a mistrial, which the court denied, instead instructing the jury to disregard the statement. During final jury instructions, the court reminded the jury not to consider stricken testimony as evidence.

¶18 Our supreme court considered similar situations in *Dann*, 205 Ariz. 557, ¶¶ 40-46, 74 P.3d at 243-44, and *State v. Hoskins*, 199 Ariz. 127, ¶¶ 54-58, 14 P.3d 997, 1012-13 (2000). In *Dann*, a witness testified that when she encouraged Dann to turn himself in, he replied "[t]hat's not an option. I can't go back to jail." 205 Ariz. 557, ¶ 40, 74 P.3d at 243 (emphasis omitted). There, as here, the statement suggested the defendant had a criminal record. *Id.* ¶ 41. The court determined admission of that testimony was error, but that the curative instruction to the jury, coupled with the overwhelming evidence of Dann's guilt, rendered the error harmless. *Id.* ¶ 46. Similarly, in *Hoskins*, a witness testified he knew Hoskins because they had been arrested together as juveniles while making a "beer run." 199 Ariz. 127, ¶ 54, 14 P.3d at 1012. Defense counsel objected, and the court recessed to consider the issue; the court eventually denied the request for a mistrial and asked whether defense counsel would prefer that it admonish the jury not to consider the statement or to proceed without comment. *Id.* ¶ 56. Hoskins chose to proceed without comment. *Id.* Our supreme court found the record contained strong circumstantial evidence of Hoskins's guilt, and found no abuse of discretion. *Id.* ¶ 58.

¶19 Mariscal insists *Dann* and *Hoskins* are distinguishable because "the evidence of guilt in this case was not so overwhelming." He contends the jurors considered the testimony "while listening to closing arguments, in which the crux of the defense's argument was that Mr. Mariscal did not know that law

enforcement vehicles were pursuing him after he left the parking lot."

¶20 As in *Dann* and *Hoskins*, however, the record contains strong circumstantial evidence that Mariscal willfully fled from police. Mariscal had been pulled over by Officer G. in a marked police cruiser, with his overhead lights operating. Mariscal handed the officer his driver's license, and the officer still had the license when Mariscal pulled out of the parking lot, sped away at seventy to ninety miles per hour, and ran two red lights. Officer G. and another officer followed Mariscal for one or two minutes, but did not keep up with his speed, and turned off their lights after a few seconds. Although Officer G.'s reference to "other offenses" violated the court's pretrial order, there is no reasonable probability the verdict was affected by that statement given the overwhelming evidence of Mariscal's guilt and the curative instruction to the jury. *See Dann*, 205 Ariz. 557, ¶¶ 40-46, 74 P.3d at 243-44.

¶21 Mariscal also relies on three cases decided by our supreme court in which a police officer's testimony referring to a defendant's criminal record was found to be reversible error. *See State v. Saenz*, 98 Ariz. 181, 183-85, 403 P.2d 280, 281-82 (1965) (testimony defendant admitted previous acquittal of drug offense improper); *State v. Gallagher*, 97 Ariz. 1, 7-8, 396 P.2d 241, 245 (1964) (testimony suggesting defendant previously had been in jail improper), *disapproved on other grounds by State v. Greenawalt*, 128 Ariz. 388, 395, 626 P.2d 118, 125 (1981); *State v. Jacobs*, 94 Ariz. 211, 213-14, 382 P.2d 683, 685 (1963) (admission of photograph described as "mug shot" improper). He asserts the cases show "a strong position against the volunteered testimony of police officers regarding the alleged misconduct of criminal defendants." But those cases are distinguishable. Unlike here, in none of those cases is it apparent the trial court immediately sustained an objection or instructed the jury. *Saenz*, 98 Ariz. at 183, 403 P.2d at 281; *Jacobs*, 94 Ariz. at 212, 382 P.2d at 684; *Gallagher*, 97 Ariz. at 7-8, 396 P.2d at 245. The jury here was instructed not to consider evidence when an objection to that evidence was sustained. We presume the jury followed that instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132

P.3d 833, 847 (2006). The trial court did not err in denying the motion for mistrial.

Criminal Restitution Order

¶22 Although Mariscal has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.[5] In its sentencing minute entry, the trial court ordered that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Mariscal] is in the Department of Corrections." The court's imposition of the CRO before the expiration of Mariscal's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered that the imposition of interest be delayed until after Mariscal's release. *See id.* ¶ 5.

Disposition

¶23 For the foregoing reasons, we vacate the criminal restitution order but otherwise affirm Mariscal's conviction and sentence.

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[5] Mariscal's sentence on November 13, 2012, predates the April 1, 2013 effective date of the most recent amendment of A.R.S. § 13-805, which now allows immediate entry of a criminal restitution order in favor of persons entitled to restitution. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1. Even if sentencing occurred after April 1, 2013, the amendment would have no effect here because Mariscal was ordered to pay only attorney's fees, which were not affected by the amendment. *See State v. Cota*, __ Ariz. __, ¶ 16, 319 P.3d 242, 247 (App. 2014) ("[A] court may not lawfully impose a CRO at sentencing with respect to fees and assessments.").